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March 17, 2021

Patricia S. Connor, Clerk  
U.S. Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA 23219

**Via CM/ECF**

Re: *In re: Donald J. Trump*, No. 18-2486  
*District of Columbia et al. v. Trump*, No. 20-1839

Dear Ms. Connor:

We write to request guidance from the Court concerning recent orders issued in the above-captioned cases that appear to be in tension with one another, if not in direct conflict.

In June 2017, the District of Columbia and Maryland filed this lawsuit against President Trump in his official capacity. The District and Maryland subsequently amended their complaint to allege a claim against President Trump in his individual capacity. Represented by the U.S. Department of Justice on the official-capacity claim and private counsel on the individual-capacity claim, President Trump sought dismissal of both claims. The district court considered the official-capacity claim first and, in two separate opinions, denied his motion to dismiss. President Trump thereupon filed a mandamus petition seeking, among other things, dismissal of the official-capacity claim with prejudice. A panel of this Court granted the petition, but the en banc Court vacated that opinion and denied mandamus relief. President Trump then filed a petition for a writ of certiorari in the U.S. Supreme Court. On January 25, 2021, the Supreme Court issued the following order:

The motion of Scholar Seth Barrett Tillman, et al. for leave to file a brief as amici curiae is granted. The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss the case as moot. See *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950).

On March 9, 2021, the en banc Court issued an order in the mandamus action stating as follows: “In obedience to the mandate of the Supreme Court, we remand this case to the district court with instructions to dismiss the case as moot.” See Doc. 118, Case No. 18-2486 (“First Order”).

Because the District and Maryland amended the complaint to add a claim against President Trump in his individual capacity after briefing on the official-capacity claim was underway pursuant to Federal Rule of Civil Procedure 12, the individual-capacity claim has always been treated

separately by both the district court and this Court. *See, e.g., In re Trump*, 958 F.3d 274 (2020) (en banc) (official-capacity opinion (No. 18-2486)); *District of Columbia v. Trump*, 959 F.3d 126 (2020) (en banc) (individual-capacity opinion (No. 18-2488)). The district court never issued an opinion or judgment relating to the individual-capacity claim, but instead expressly reserved a ruling on President Trump’s separate motion to dismiss the claim. The district court’s delay in ruling on that motion was the subject of an appeal in 2018 that was not consolidated with, but was argued on the same days as, the official-capacity mandamus case both before the panel and the en banc Court. In May 2020, the en banc Court granted the District and Maryland’s motion to dismiss the individual-capacity appeal for lack of appellate jurisdiction and remanded the claim to the district court for further proceedings. On remand, the District and Maryland promptly voluntarily dismissed the individual-capacity claim under Federal Rule of Civil Procedure 41, ECF No. 182, which the district court recognized in an order on July 30, ECF No. 187. President Trump then filed a second appeal from the district court’s order concerning dismissal of the individual-capacity claim. While that appeal was in briefing, President Joseph R. Biden, Jr. was inaugurated as the forty-sixth President of the United States. Because the District and Maryland’s claims—including the individual-capacity claim—were premised on Mr. Trump’s conduct while President, the District and Maryland filed a motion to dismiss the appeal as moot, which Mr. Trump’s lawyers did not oppose.

Just minutes after the en banc Court issued the First Order remanding the official-capacity case while allowing the district court opinions to stand, an order issued in the individual-capacity appeal. *See* Doc. 28, Case. No. 20-1839 (“Second Order”). The Second Order stated as follows:

The Supreme Court granted Donald J. Trump’s petition for a writ of certiorari from earlier action in this case, vacated our earlier opinion in *In re: Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc), and remanded with instructions to dismiss the case as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (noting that the “established practice” when a case has become moot while on appeal is “to reverse or vacate the judgment below and remand with a direction to dismiss”). Accordingly, we dismiss this appeal as moot, vacate the decisions below in *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018); 315 F. Supp. 3d 875 (D. Md. 2018); and 344 F. Supp. 3d 828 (D. Md. 2018), and remand with instructions to dismiss the case.

Notably, the Second Order did not arise from an appeal that implicated either of the district court opinions whose vacatur it directed—both of which concerned only the official-capacity claim. Accordingly, the Second Order appears to be inconsistent with the First Order in its interpretation of the Supreme Court’s directive. It is also unclear how the Court had authority in the Second Order to vacate the district court’s decisions in the context of an appeal of an entirely separate and unrelated district court order—the July 2020 order concerning the District and Maryland’s voluntary dismissal of the individual-capacity claim. Because the First Order was both first in time and was issued by the en banc Court, it is our understanding that the First Order is controlling. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (en banc) (“[W]e conclude that when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting en banc or by the Supreme Court.”); *Booth v. Maryland*, 327 F.3d 377, 383

March 17, 2021

Page 3 of 3

(4th Cir. 2003) (“It is quite settled that a panel of this circuit cannot overrule a prior panel. Only the en banc court can do that.”). But given the apparent inconsistency between the two orders, we write to request guidance as to which order reflects the Court’s implementation of the Supreme Court’s January 25, 2021 order.

Respectfully submitted,

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cc: All Counsel in Nos. 18-2486 and 20-1839 (via CM/ECF only)